Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
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Amendment of Part 73 of the Commission's Rules concerning the Filing of Television Network Affiliation Contracts	))))	MM Docket No. 95-40

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COMMENTS OF MEDIA ACCESS PROJECT

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SUMMARY

MAP urges the Commission to place primary attention on the following issue: whether modification or repeal of the "filing of affiliation contracts" rule would hinder the public in its rightful participation in Commission proceedings. This is not merely a matter of concern to networks and affiliates. The viewing public has a well-settled right to participate in Commission proceedings as "private attorneys general" to ensure that broadcast stations serve the public interest. *UCC v. FCC*, 359 F.2d 994 (D.C. Cir 1966).

The sad irony of the Commission's proposal to repeal the rule is that in abdicating day-to-day oversight of broadcasters, the Commission has repeatedly placed increased reliance on enforcement proceedings generated by public complaints as adequate to police the public interest. Now it seeks to pull out the rug from under any attempt by the public to monitor compliance with the rules governing network-affiliate relationships.

The cost to broadcasters in filing affiliation agreements do not outweigh the benefit of full public disclosure. The direct costs, per station, to submit and properly format the contracts are likely to be minuscule.

Moreover, the indirect costs posited by the Commission, *i.e.*, that public filing would lead to collusive behavior among the networks and reluctance on the networks' part to tailor their agreements to meet affiliates' special needs, are, first, highly conjectural. Second, traditional economic theory and common sense dictate that increased dissemination of information would have a positive impact on the functioning of the marketplace. Finally, there is no indication that these so-called costs would be lessened if the rule were repealed, and indeed, especially in the case of smaller, weaker affiliates, may become more severe.

Finally, the Commission has not effectively made the case that affiliates' bargaining power has increased to the extent that the rule is no longer necessary. Its reliance on a few isolated instances of affiliate switching ignores recent (and proposed) rule changes that have increased network power to a far greater degree.

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COMMENTS OF MEDIA ACCESS PROJECT

Media Access Project ("MAP") respectfully submits these comments in response to the Commission's *Notice of Proposed Rulemaking*, FCC No. 95-145 (released April 5, 1995)("*NOPR*"). The *NOPR* makes a number of proposals for the repeal or modification of the "filing of affiliation contracts" rule, 47 CFR §73.3613(a) ("rule"). The rule requires television broadcast licensees to file with the Commission copies of any affiliation contracts, agreements, and understandings with broadcast television networks, *i.e.*, ABC, CBS, NBC, and Fox.

MAP urges the Commission to place primary attention on the following issue: whether modification or repeal of the rule would hinder the public in its rightful participation in Commission proceedings. Time and again, the Commission has abdicated day-to-day oversight of broadcasters, asserting that increased reliance on enforcement proceedings generated by public complaints was adequate to police the public interest. Yet, in this action, the Commission proposes to limit public access to a source of information that is necessary to ensure public monitoring of network-affiliate relationships.

I. REPEAL OF THE RULE, OR MODIFICATION TO PREVENT PUBLIC DISCLOSURE OF AFFILIATION AGREEMENTS, WOULD SEVERELY HANDICAP THE PUBLIC'S EXERCISE OF ITS RIGHT TO PARTICIPATE IN COMMISSION PROCEEDINGS TO ENSURE THAT LICENSEES SERVE THE PUBLIC INTEREST.

The Commission has requested comments on whether licensees should be required to file affiliation contracts, *NOPR* at ¶12, and, if so, whether they should be required to make these contracts available to the public. *Id.* at ¶13. While it notes that one value of the continued availability of these agreements is that they allow the "general public to inspect them and to file complaints where abuses of the public interest are discovered," *id.*, it treats this matter as one of concern only to television networks and their affiliates.

The "general public" consists of viewers, not broadcasters. Moreover, it is the public's First Amendment right to receive information which is "paramount." *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

The Commission must not underestimate the magnitude of the benefits of public disclosure. The public's right to participate in Commission proceedings as "private attorneys general" to ensure that broadcast stations serve the public interest is a fundamental tenet of mass media law. *See UCC v. FCC*, 359 F.2d 994 (D.C. Cir 1966). In that opinion, then-judge Burger wrote that the court could see "no reason to exclude those with such an obvious and acute concern as the listening audience." *Id.* at 1002.

Furthermore, the court found that it was insufficient that the Commission performed a similar monitoring role. "The theory that the Commission can always effectively represent the listener interests....without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general....is no longer a valid assumption." *Id.* at 1003. "Unless the listeners - the broadcast consumers - can be heard, there may be no one to bring programming deficiencies or offensive overcommercialization to the attention of the Commission in an effective manner." *Id.* at 1004-05.

The sad irony of the Commission's proposal to repeal the rule is that its previous decisions reducing day-to-day monitoring of broadcaster compliance with the Communications Act have been premised on the full and effective participation of the public to enforce such compliance. Time and again, the Commission has ruled that a process of public complaints and petitions to deny in specific instances of abuse would be effective to ensure compliance in lieu of agency monitoring. *E.g.*, *Television Deregulation Report and Order*, 98 FCC 2d 1076, 1109-1110 (1984); *Radio Deregulation Report and Order*, 84 FCC 2d 968, 1010-1011 (1981); *aff'd in part, rev'd in part, sub nom.*, *UCC v. FCC*, 707 F.2d 1413 (1983). But repeal of the rule would effectively pull out the rug from any attempt by the public to monitor compliance with the rules governing network-affiliate relationships.

As examples, two important matters are now pending before the Commission which could not have been initiated without public access to affiliate contracts. *See* July 19, 1992 Petition for Reconsideration of Anthony Pharr, *et al.*, in File No. BAPCT-890418KF; April 21, 1994 Petition to Deny of Anthony Pharr, *et al.*, in File No. BLCT-93040KF. In these cases, several individuals and a public interest organization allege, *inter alia*, that a network affiliation agreement, taken along with other financial agreements (also required to be filed at the Commission) demonstrate that the network has actual control of the affiliate in violation of the Communications Act and the Commission's regulations. Not only did the filing of the affiliation agreement give the complainants the information they needed to make a good faith argument in the first place, but it allowed them to discover, one year later, that the agreements had been amended on an *ex parte* basis. *See* April 21, 1994 Motion for Leave To Submit Late Filed Petition to Deny of Anthony Pharr, *et al.*, in File No. BLCT-93040KF at 1-2.

Instead of the current filing requirement, the Commission has proposed a system of "complaint-initiated requests for affiliation contract information." *NOPR* at ¶17. But this will prove wholly unworkable, because there would be no mechanism to put the public on notice of objectionable elements in affiliation agreements. No other documents are available to the public that provide the information available in affiliation agreements. Instead, a member of the public who suspects objectionable material exists in the affiliation contract could only find out ***after*** filing a complaint. This could produce one of two undesirable results: (1) a chilling effect on complaints filed by the public, or (2) exactly the opposite, *i.e.* more "fishing expeditions" in the complaint process. For complaints which specifically allege network abuse, a public complainant would face the formidable task of establishing a *prima facie* case in a complaint without the benefit of the document that fixes the legal rights and liabilities of the parties.

II. THE BENEFITS OF RETAINING THE RULE OUTWEIGH THE COSTS.

Pursuant to the cost-benefit analysis framework established by the *NOPR*, the Commission has requested evidence on the magnitude of the direct and indirect costs of the rule's continued operation. The Commission has alleged that the direct costs include any additional expenses the broadcasters must incur in filing the affiliation agreements. *NOPR* at ¶14. The Commission supposes that the indirect costs take two potential forms: collusive behavior among the networks or their affiliates, *id.* at ¶15, or a reluctance by the networks to tailor their affiliation agreements to the individual affiliates. *Id.* at ¶16.

A. Direct Costs

The Commission notes that the direct costs of the rule consist of any expenses the broadcaster must incur to prepare and submit the contracts to the commission, over the expenses incurred to prepare the contracts in the first place. *NOPR* at ¶14.

MAP fails to see how these direct costs could have any significant magnitude. The actual costs to submit the contracts are minimal - consisting of postage or the cost for use of a bicycle messenger. The costs to prepare the contract for submission would not be much greater. The only alteration to the original document required by the rule is that the contract must be reduced to one instrument so that there are no references to other documents or to oral agreements. 47 CFR §73.3613(a)(2). But this cost is also very small - with the advent of modern word processors, this can be accomplished with a few keystrokes.[1] Moreover, the single-document requirement does not even extend to renewals, changes or amendments. 47 CFR §73.3613(a)(2).

B. Indirect Costs

The Commission alleges that the indirect costs of the rule are "potentially more serious" than the direct costs. *NOPR* at ¶15. It describes two kinds of indirect costs. First, it supposes that the availability of affiliation agreements "may facilitate the ability of parties either seeking or offering affiliation to avoid competition." *NOPR* at ¶15. For example, in markets where there are more stations seeking affiliation than networks offering it, networks might collude to lower the compensation they offer these stations. *Id.* Second, the Commission posits that the availability of contract data "reduces a network's ability and willingness to craft contractual arrangements with one affiliate to recognize special market conditions of that affiliate." *NOPR* at ¶16. Supposedly, if a network offers innovative terms to one affiliate, other affiliates will discover this and demand similar terms. *Id.*

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[1]The Commission's Radio Network Affiliation *NOPR* stated that there were significant costs for preparing these documents, noting that the paperwork burden was almost 2500 man-hours over the entire industry. But this equates to only ***40 minutes per licensee***. *See* Radio Network Affiliation *NOPR*, 101 FCC 2d 516, 517 (1985). A 40 minute burden would not be objectionable where the availability of these agreements produces a significant benefit to the public.

1. The Marketplace Works More Effectively When There Is Full Dissemination Of Information.

By presupposing the existence of these indirect costs, the Commission implies that enhanced access to market information creates incentives for price fixing among affiliates or networks. The argument concludes that ***more*** information may result in collusion and dishonesty, whereas uncertainty and secrecy will result in increased fairness.

This argument turns traditional market analysis on its head and runs against the overwhelming body of economic theory. It is well settled that "the existence and availability of accurate information is necessary in order for the market to function at its highest level of efficiency." *Report and Order*, 101 FCC 2d 516, 518 (1985). What economists call "Perfect Information Theory" teaches that imperfect information about such things as prices, product quality, or existence of substitutes can lead to incorrect decisions, higher prices, and lower quality. *See e.g.,* James Gwartney, Microeconomics: Private & Public Choice (1977) at 306; David Hemenway, Prices & Choices: Microeconomic Vignettes (1977) at 122-23; C.E. Ferguson, Microeconomic Theory (3d ed. 1972) at 252.

Moreover, this argument defies common sense. At best, nondisclosure will not make a difference, as parties are still free to share information at will. The fact is, however, nondisclosure is ***more*** likely to result in collusion, as noted *infra* at page 8.

2. The Commission Provides No Evidence Of The Existence Of These Indirect Costs.

As a preliminary note, MAP cautions the Commission not to accept the existence and magnitude of these indirect costs based on mere speculation. Significantly, nowhere in the *1985 Report and Order* - the most recent review of the rule's operation in both radio and television markets - does the Commission mention these indirect costs. *See generally, Report and Order*, 101 FCC 2d 516 (1985). The rule has been in effect for broadcast television for over 25 years, yet there has been no mention of these two indirect costs until now. Before the Commission discards a rule which has worked well and is essential to the public's ability to police its own interests, it should place a heavy burden of proof on those parties who would change the *status quo*.

Specifically, for the collusion argument, there is no actual proof - theoretical economics aside - of instances where dissemination of contract data has led to anticompetitive behavior by either party to a network-affiliate negotiation.

The Commission's contract standardization argument is even more unfounded. In contrast to its collusion argument, the Commission does not even cite economic scholarship to support this hypothesis. *See generally, NOPR* at ¶¶15, 16. Moreover, it has not presented any evidence that: (1) the current arrangements are not sufficiently responsive to the market conditions of affiliates, and (2) the networks would craft novel arrangements in the absence of the rule.

3. Repeal of The Rule Would Not Reduce, And Indeed May Increase, Collusion Among Networks Or Affiliates.

Assuming *arguendo* that anticompetitive behavior does occur, the cost of such behavior may be insignificant unless it occurs with great frequency. If these are merely a few isolated incidents of anticompetitive behavior, they do not merit total repeal of what is otherwise an effective rule. As isolated incidents, they are best handled on a case-by-case basis by the Commission or the Department of Justice.

Moreover, nothing exists to stop affiliates or networks from sharing contract information even in the absence of the rule. To prepare for negotiations, an affiliate will naturally seek out information concerning compensation received by other stations in its market. There is little reason for these other affiliates not to share such information, because their agreements are already fixed and it would build the goodwill of their colleagues. Therefore, even if the rule were repealed it would not spell an end to information sharing among networks or affiliates.[2]

Furthermore, repeal of the rule may lead to a *less* even playing field. Clandestine sharing of information between certain parties invites collusion and discrimination against other, weaker parties. In other words, nondisclosure would replace what is currently an equalized playing field in terms of information sharing, with a playing field in which certain players may collude to discriminate against others who have no other way to obtain the information being withheld.

4. The Commission Has Not Proven How Standardization Of Contract Provisions Is Harmful.

The Commission provides no empirical or anecdotal support for its fear that the rule would reduce a network's willingness or ability to craft specific contract provisions to reflect market differences. It posits that "a network may be reluctant to do so if its other affiliates can discover such improved or different terms and are likely to demand similar terms." *NOPR* at ¶16.

But, as discussed previously, elimination of filing requirements would not prevent affiliates from sharing affiliation contracts or other information relevant to the network-affiliate relationship. Second, the Commission incorrectly assumes that all affiliates are created equal, *i.e.*, that an affiliate in Topeka, Kansas could seriously argue that it deserves equal treatment as one in New York. But because of differences in bargaining power and audience reach, this obviously

[2]Members of the public, however, would still be left without this information.

is not the case. These market differences are, of course, the reason that these provisions are specially crafted in the first place.

However, and in any event, the Commission appears to believe that the ability of affiliates to make contractual demands on networks based on other affiliation contracts is an undesirable result. Evidently, the Commission would prefer to inject itself into the private contract negotiations between two parties, and ensure that at least one of those parties, the affiliate, comes into those negotiations with less information.

As the Commission notes, public filing of affiliation contracts helps those affiliates most in need - the weaker affiliates. *NOPR* at ¶16. Eliminating the public filing requirement would hurt those affiliates, because, as the Commission notes, they need such information "to ensure that they receive comparable or competitive compensation...thereby strengthening their overall financial condition and ability to serve the public." *Id.* But affiliates in the top markets, by virtue of their stronger bargaining position, would still be able to extract concessions from the networks. The dissemination of information provided by the rule helps to correct this disparity.

III. THE PROPOSALS TO REPEAL THE RULE ARE PREMISED UPON EXAGGERATED ESTIMATES OF THE BARGAINING POWER OF AFFILIATES RELATIVE TO NETWORKS.

The Commission has raised the issue that the benefits of continued Commission monitoring of the network/affiliate relationship - as well as the deterrent effect that public monitoring provides - may have diminished greatly due to "dramatic[]" changes in the video marketplace. *NOPR* at ¶11. Observing an increase in the number of broadcast stations available for affiliation and the emergence of new, aspiring networks, it posits that the affiliates may have gained bargaining power relative to the networks, although the amount of this gain may differ from market to market. *Id.* As proof, the *NOPR* looks to recent instances of affiliate switches. *Id.*

The Commission's premise is misguided because it exaggerates the importance of a few isolated occurrences of affiliate switching. Based solely on the aberrant events of the past year, when a number of network affiliates changed their affiliation, it leaps to the conclusion that continued monitoring the network/affiliate relationship is no longer necessary. This grossly overstates the willingness of a station simply to drop its affiliation.

First, it is important to note that the affiliate switching of the past year was an unprecedented event which occurred for two reasons - Fox obtained the rights to the National Football Conference regular season football games and invested $500 million in 12 New World Communications stations in exchange for their affiliation with Fox. Stations changed affiliation not in a show of strength or to free themselves of the constraints of another network, but because it was in their best interest economically. There is no reason to think that an equally monumental event will occur any time in the near future. And it is by no means clear that these events will prove to reflect any actual change in power relationships.

In any event, affiliates are not free to go "network hopping," primarily because it simply may not be possible. In the top 50 markets, the major networks each have one affiliate, and are permitted only one per market under the dual network rule. 47 CFR §73.658(g). Therefore if, for example, an ABC affiliate wanted to switch, it could not move to NBC, CBS or Fox unless an affiliate of those networks could also change affiliation.

Furthermore, switching affiliations is a business move with inherent risks and costs. First, as was demonstrated recently in Phoenix, where four of the five largest stations changed affiliations, switching can cause frustration and disorientation among viewers, who may no longer know which station carries their favorite shows.[3] Stations would have to finance advertising campaigns to notify viewers of the change, and may still lose some of the audience.[4] Also, because programs offered by Fox, UPN, or WB are likely to have lower ratings than programs from the major networks,[5] a station might lose advertising revenue by switching to one of these newer networks.

Thus, while the Commission estimates that the ability of affiliates to leave a network has diminished to some extent the power of networks over affiliates, *NOPR* at ¶11, it is unlikely that affiliates will use this power except in the rarest cases.[6]

Moreover, there are several pending initiatives in Congress and before the Commission that could render wholly inaccurate any Commission estimate of affiliate bargaining power. The

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[3]Andy Meisler, "Murdoch's Raid Brings a Shuffling of TV Stations in Phoenix," N.Y. Times, Aug. 29, 1994, at D1. In the space of about five months, four out of the five largest stations switched affiliations, with only the NBC affiliate staying put. One station, KSAZ, was left with no affiliation for three months. Stations reported being "bombarded" with calls from viewers and agreed that long-established viewing habits would be wiped out. *Id.*

[4]For example, KPHO, the new CBS affiliate, spent $1 million to promote the switch. *Id.* Even KPNX, the NBC affiliate which did ***not*** switch, had to increase its promotion budget. *Id.*

[5]For example, in its first ten years on the air, the Fox network has had only mixed success. Even today, with a few hit offerings, the network is in last place in weekly ratings and rarely places shows in the top 20. But compared to Fox's ratings, the ratings of WB and UPN offerings are microscopic.

[6]Moreover, with the sunset of the financial interest and syndication rules ("FISR"), the networks will have substantial economic incentives to dictate affiliate programming choices. It is indisputable that the sunset of FISR will allow the networks to achieve greater levels of vertical integration in the programming industry. For the first time in over twenty years, they will be able to own and syndicate the programming that appears on their O&O stations and affiliates. It will also give them the ability, to use this unprecedented level of power to stimulate demand for these programs, and thereby maximize profits.

Also, a rulemaking is pending at the Commission which examines the necessity of the Prime Time Access Rule ("PTAR"). Mass Media Docket No. 94-123. In the event PTAR is repealed it would further alter the relationship between networks and affiliates.

Senate telecommunications reform legislation, S. 652, would raise the national audience reach cap from 25% to 35% for the purpose of determining the national ownership limits for television.[7] S. 652, 104th Cong. 1st Sess. §207(b)(1) (1995). The House bill, H.R. 1555, goes much further. First, it lifts all national numerical ownership limits for television stations and raises the national audience reach cap to 50% after one year. Second, it permits ownership of more than one television station in a local market, and ownership of more than one network. Third, it lifts all national and local cross-media ownership restrictions, *e.g.*, broadcast-newspaper, cable-network, broadcast-cable. *See* H.R. 1555, 104th Cong. 1st Sess. (1995). In addition, the Commission has proposed eliminating the numerical limit on TV station ownership, and has proposed permitting the household reach cap be increased 5% every 3 years until reaching the final limit of 50%. *Further Notice of Proposed Rulemaking*, FCC No. 94-322 (released January 17, 1995) at ¶101.

Adoption of any of these proposed changes to the multiple ownership rules would enable the networks to achieve unprecedented levels of concentration and power. In the top markets, it is likely that the networks will purchase their affiliates outright, thus completely foreclosing the possibility of affiliate resistance.[8] Network takeovers of affiliates in the top markets also signals a veiled threat to stations in smaller markets: cooperate or risk takeover. In these cases,

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[7]S. 652 is being debated on the Senate floor at the time of this filing. An amendment to eliminate the numerical limit on national television ownership passed on June 9.

[8]In fact, virtually all of the networks' owned and operated ("O&O") television stations are located in the largest television markets. It is commonly understood that these stations are a network's most profitable assets. Geraldine Fabrikant, "Putting a Price Tag on NBC Proves a Tricky Task," N.Y. Times, Sep. 15, 1994, at D17. *See also,* Craig Blakeley, "Pressler Plan Would Alter Balance of Power," *Electronic Media*, Feb. 20, 1995, at 30.

filing of contracts would be more critical than ever to protect local affiliates from undue network influence. These proposed initiatives serve as yet another yellow light urging the Commission to proceed with extreme caution before it takes any action here. At a bare minimum, the Commission should withhold its final decision on retention of the rule pending the outcome of these reform initiatives, and, if reform occurs, it should wait until a sufficient time has passed to evaluate the effect on the programming market.

CONCLUSION

Filing and disclosure of affiliation agreements is essential so that citizens may participate effectively in Commission proceedings to ensure that broadcast stations operate in the public interest. Moreover, the costs which may result from the continued operation of the rule are either minimal or remote. For these reasons, the Commission should retain the rule in its current form.

Respectfully Submitted,

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